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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 955

T. Y. FONG, Individually and Trading as ASIA DEVELOPMENT CORPORATION and as HONG KONG SHIPPING CORPORATION, LTD., *Petitioner*

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered February 10, 1962, which affirmed the Judgment entered on February 11, 1959, by the United States District Court for the Northern District of California, Southern Division.

OPINIONS BELOW.

The opinion of the Court of Appeals (Appendix A) is not yet reported. The opinion of the District Court (R. 221-230) is reported at 182 F. Supp. 446.

JURISDICTION

The Judgment of the Court of Appeals was entered on February 10, 1962 (Appendix B.). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Has petitioner been deprived of his property, in the amount of $516,000.00, in violation of Fifth Amendment due process where:

I. (a) he complies with orders for the production and admission of documents and is willing to complete his deposition immediately where he is (the Government spurning such offer) or in the United States as soon as possible, but is under medical orders not to travel and therefore cannot return to the United States within the required 30 days, and the Court refuses to vacate its default order or the Judgment by default?

(b) an answer has been stricken as a "sanction", is the Court "required", as stated by the Courts below, to accept as true at the trial on damages the "information and belief" allegations of alter ego in the complaint despite the provisions of Rule 55(b)(2) FRCP?

II. Has petitioner been deprived of his liberty, and his property restrained in violation of Fifth Amendment due process where petitioner was jailed under the False Claims Act, bonded in the amount of $50,000, and his right of travel severely restricted, but both Courts below refused to rule on the validity of such asserted violation of the False Claims Act?

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

The relevant Constitutional provision involved is the Fifth Amendment to the Constitution of the United States, the relevant statute is the False Claims Act (31 U.S.C. § 231) and the relevant Federal Rules of Civil Procedure are Rules 37(d), 55(b)(2), 55(c), and 60(b). Such materials are set forth in Appendix C hereto.

STATEMENT OF THE CASE

The Contract

On October 10, 1947, the United States Maritime Commission invited sealed bids from citizens and nationals of friendly nations for the purchase of seventeen "vessels immobilized in Subic Bay, Philippine Islands, declared constructive losses for all purposes and determined to be damaged beyond reasonable repair." (R. 24, 39). Bids could be submitted on any or all vessels. A bidder was required to submit satisfactory evidence of responsibility and qualifications to perform the obligations of the contract. Each bid had to be accompanied by an affidavit of nationality and the Maritime Commission reserved the right to reject the bid even after its acceptance by the Maritime Commission should it be determined that the bidder was a national of a country prohibited from engaging in commercial transactions with the United States. 25% of the amount of the bid was required to accompany the bid. The Maritime Commission reserved the right to make any award it may deem most advantageous or will best serve the purposes and policy of the Merchant Marine Act of 1936. (R. 24-29).

The terms of sale provided that: (1) Each of the vessels was offered for sale "as is, where is" at time of

delivery. The bill of sale conveying title in each of the vessels from the Commission to the Buyer fully warranted title and freedom from all liens. (2) The Buyer of each of the vessels assumed all the risks of ownership thereof from the time of receipt of notice of acceptance of bid. (3) The Buyer shall completely scrap, dismember, dismantle, or destroy the hulls or hulks of the vessels, in such manner and to such extent as to prevent their use as a means of transportation except such of the vessels, or hulls or hulks of the vessels, as may be lost at sea or otherwise destroyed. (4) Such scrapping was to be performed within two years from the date of delivery of the first five vessels purchased and with an additional allowance of one month for each additional vessel purchased. (5) The Buyer was obligated to provide the Commission with a duly authenticated certificate by a reputable marine surveyor of a recognized organization engaged in the work of marine surveying that such scrapping had been accomplished. The Buyer, however, was permitted to abandon the vessels if the vessels were unusable as a means of transportation. (6) In the event the Buyer is delayed in moving, scrapping or destroying the vessels and the Commission is satisfied that such delay had been caused by conditions beyond the control of the Buyer or by conditions which by the exercise of reasonable diligence the Buyer was unable to prevent "then the Commission shall, by consent in writing, extend the time" for such scrapping for such period as the Commission shall deem just, reasonable, and proper. (7) The scrapping obligations of the contract were the primary considerations for the sale of the vessels and the failure of timely performance would cause the Commission substantial damage difficult of ascertainment. Consequently, the contract provided a schedule of liqui-

dated damages calling for the sum of $100 per vessel, per day, for a maximum of 180 days, for unexcused delay in scrapping and a lump sum amount of $25,000, per vessel for total default under the contract. Such total default was defined as a failure, neglect or refusal to scrap after the expiration of the aforesaid 180 days. (8) The Buyer was precluded from selling or assigning any of its rights or obligations under the contract without the prior written consent of the Commission and all terms of the contract were binding upon the successors and assigns of the parties. (R. 29-38).

On November 10, 1947, a bid on fifteen of the seventeen wrecked vessels in the amount of $271,000 was submitted to the Maritime Commission by the Asia Development Corporation of Shanghai, China. On February 2, 1948, the Maritime Commission accepted such bid. (R. 43-46). On March 11, 1948, the Maritime Commission executed fifteen bills of sale and transfer orders approving the sale of the vessels to Asia Development Corporation. (R. 447-511).

The Arrest

At 7:00 or 8:00 p.m. on New Year's Eve 1956, T. Y. Fong, a Nationalist Chinese alien, who had been visiting his school children in the United States for several months, was arrested in the presence of his wife and children and jailed by the United States Marshal in San Francisco. In addition to the Deputy United States Marshal executing the warrant, an Assistant United States Attorney was present at the arrest. (R. 49-50, 125, 278). The arrest was publicized through statements to the newspapers by Government spokesmen that Mr. Fong had illegally sold surplus ships to Communist China.

The basis for such arrest was a Complaint sworn to by an attorney for the Department of Justice charging that Asia Development Corporation was the alter ego of Mr. Fong, that the contractually required scrapping certificates submitted to Maritime were false, that the civil False Claims Act had accordingly been violated and praying for damages in the amount of $764,000. (R. 15-23). The Court ordered a bench warrant to issue and fixed bail in the amount of $50,000. (R. 49). The same day, December 31, 1956, the United States moved the Court to increase the bail to $752,000. (R. 46). Such motion was ordered off calendar by the Court. (R. 4). On January 2, 1957, Mr. Fong posted the required bail and was released from jail on the condition that he remain within certain stated court jurisdictions. (R. 51-53). The only authority for the arrest and the imposition of $50,000 bail is § 233 of Title 31, U.S.C.

The allegedly false scrapping certificates described in paragraphs XVIII and XIX of the sworn Complaint (R. 22), on which the Government solely based its charges of violation of the False Claims Act were neither attached to the Complaint or in any manner thereafter presented to the Court by the Government.

Proceedings Prior to Trial

By agreement between the parties, no further pleadings were filed until June 3, 1957. During such period counsel for Petitioner gave the Government copies of every available evidentiary document. (R. 287-288).

On June 3, 1957, counsel for Petitioner filed a Motion to Dismiss the Complaint, in order to test the validity of the asserted violation of the False Claims Act. (R. 4). The Government asked for an extension of time

within which to respond to which counsel for Petitioner agreed. (R. 75-76). The Government filed no opposition to the Motion to Dismiss, but filed an Amended Complaint on July 11, 1957. The Amended Complaint contained four counts: (1) violation of the False Claims Act; (2) violation of the Surplus Property Act; (3) conversion of the vessels sold to Asia Development Corporation; (4) breach of contract for failure to scrap on time. The damages prayed for were: (1) Count I, $1,587,500, doubled plus forfeitures, interest and costs, (2) Count II, double the amount of damages suffered by the United States, plus the sum of $2,000 for each fraudulent act, together with interest and costs, (3) Count III, $1,587,500, togther with interest and costs, (4) Count IV, $645,000, as liquidated damages, together with interest and costs. (R. 55-74).

On July 12, 1957, counsel for Petitioner filed a Motion to Dismiss the First Count of the Amended Complaint, violation of the False Claims Act, together with Points and Authorities in support thereof. (R. 75-81). Attached to the aforesaid Motion to Dismiss were copies of the allegedly false scrapping certificates together with an affidavit by the maker of the scrapping certificates (Captain W. A. Doust) that the statements contained in these certificates are true, that the handwriting on the certificates was his and that his signature was genuine. (R. 81-89).

The Government has never at any time offered any evidence that the aforesaid affidavit of Captain Doust is false or that the original certificates themselves were not true and correct.

A hearing on the Motion to Dismiss the First Count on the Amended Complaint was held on July 18, 1957.

The Government filed no points and authorities in opposition to the Motion prior to argument. The Government merely stated that Mr. Fong was a deceitful and devious person who almost daily lied to the Government and who had been "an active collaborator with the Chinese Communists". (R. 267). The Assitant United States Attorney went so far as to say "I think he (Fong) probably will be getting some plaudits from Mr. Chou En Lai after the true facts are brought out." The Court never did rule on the Motion to Dismiss.

At the hearing on the Motion to Dismiss, counsel for Petitioner, whose deposition was to commence the following day, requested the Court for an Order under Rule 30(b), FRCP, to seal the deposition. The Court was advised that it was necessary to protect Mr. Fong's parents and relatives in China from persecution by the Red Chinese government which might result if Mr. Fong's record of assistance to the United States Navy was publicized. The Government opposed the Motion and the Court denied this Motion. (R. 265-268).

Following the argument on the Motion to Dismiss, July 18, 1957, counsel for Petitioner filed an Answer to the Amended Complaint. The Answer denied liability under each and every of the four counts of the Amended Complaint. (R. 94-97).

On the following day, July 19, 1957, the Government commenced the four day deposition of Mr. Fong. (R. 269-294). The deposition, later characterized by the District Court as being "rough treatment" of Mr. Fong

(R. 320), who was then under medical care for a peptic ulcer and infectious hepatitis (R. 129-130), stressed certain matters not apparently germane to the lawsuit. Mr. Fong was questioned at length concerning his family remaining in Red China, their connections with the Red government, correspondence with his father in Shanghai, financial support to his parents since 1948, and whether he had smuggled funds out of Red China. (R. 128, 269-278). Counsel for the Government threatened perjury proceedings, (R. 281, 128) and stated that the Government planned to apply for an increase in his bond. (R. 282). Presumably the increase in bond to be applied for would be a pressing of the Government's Motion to Increase Bond to $752,000. (R. 46).

The deposition was then recessed. On September 4, 1957, counsel for Petitioner advised the Court and counsel for the Government that Mr. Fong had left the country. (R. 5). On September 12, 1957, the Government filed a Petition requesting that the Court enter an Order requiring Mr. Fong to appear on September 30, 1957, and show cause why additional bond should not be required. (R. 99). The Court entered such an Order that day. (R. 100). On September 30, 1957, counsel for Mr. Fong filed a Return To Order To Show Cause. (R. 101). Such Return brought to the Court's attention the fact that the bond had legal support only if a prima facie violation of the civil False Claims Act had been pleaded, that the Motion to Dismiss the claimed violation of the False Claims Act had been pending for some time and urged the Court to hold in abeyance any action on the bond until the pending Motion To Dismiss had been decided. (R. 101-104). On October 17, 1957, the Gov-

ernment moved the Court for an Order forfeiting bond in the amount of $50,000, and for the issuance of a bench warrant for the re-arrest of Mr. Fong. (R. 108-113). On October 28, 1957, counsel for Mr. Fong filed a memorandum in opposition to the Government's aforesaid Motion. (R. 6). Neither the Motion To Show Cause or To Forfeit Bond have ever been ruled upon by the Court.

On December 4, 1957, the Court filed a Memorandum and Order Reserving Ruling On Motion To Dismiss. (R. 113-118). In its Memorandum the Court said that whether or not a false claim under the statute had been presented was "most doubtful" (R. 117), but that ruling would be reserved until trial.

Almost six months from the recessing of the deposition of Mr. Fong, on January 17, 1958, the Government filed a notice of resuming his deposition. (R. 122-123). Prior to the date set for the resumption of Mr. Fong's deposition, counsel for Petitioner filed a Motion for a Protective Order under Rule 30(b) that his further deposition be taken on written interrogatories. The Court denied the Motion. (R. 323).

On March 10, 1958, the Government filed a Motion for an Order under Rule 37(d), FRCP, striking the Answer and for an Order of Default of Defendant. (R. 130-132). Counsel for Petitioner filed an affidavit (R. 140) which stated that he had received an unsolicited telephone call from Petitioner on March 10, 1958, which represented the first personal contact between counsel and Petitioner since August of 1957. The affidavit set forth that:

> Your affiant is convinced that Mr. Fong's absence is due to his lack of understanding of judicial

processes in the United States and his deep fear of harm based on the menacing attitude and conduct of plaintiff's counsel in causing him to be arrested in a case where the Government only sought money from him, the unwarranted assertions of communist sympathies made about him in open Court, the threats of possible prosecution for perjury made in the course of his deposition, the causing of persistent inquiries to be made about him at his residence in Sao Paulo, Brazil, by the Brazilian police, and that his children, lawfully staying in San Francisco, have been questioned about him after the commencement of the case. (R. 142).

In ruling on the Motion the Court said "Whether or not his fears of some dire inquisitorial restraints being placed on him are well founded or not, are difficult to determine." (R. 323).

On April 22, 1958, counsel for Petitioner filed a Motion to Vacate Default. (R. 145-146). Attached to said Motion was an affidavit of counsel (R. 154-156) stating that he had conferred with Petitioner in Buenos Aires and for the first time Petitioner understood that the failure to complete his deposition might result in the entry of a judgment against him. He also understood for the first time that the U.S. Government, through its hiring of a Brazilian policeman to inquire as to his whereabouts, was not taking a step preliminary to his arrest in Brazil. The affidavit further set forth that Mr. Fong's doctor did not consider him in condition to travel because of a stomach chronical bleeding ulcer. (See also Affidavit of Dr. J. W. Middleton, British Hospital, Buenos Aires, Argentina, R. 153-154).

Also attached to the Motion was a cable by counsel for Petitioner from Buenos Aires, to the attorneys for the Department of Justice in Washington who were in charge of the case. The cable set forth that: (a) Mr. Fong was under medical care and directed not to travel; (b) Mr. Fong for the first time understands effect of default order; (c) Mr. Fong was willing to complete the deposition at the United States Embassy in Buenos Aires at the convenience of the Government and would prepay expenses of Government counsel. (R. 150-151). The Government replied to this offer by stating:

> By reason of the present status of this case on the docket of the Court, Mr. Brookhart's suggestion that defendant's deposition be resumed in Buenos Aires is not acceptable to plaintiff. (R. 152).

At the argument of the Motion the Court held "I don't see that the offer to continue his deposition in Argentina is legally worthy of acceptance" although Government counsel admitted that Petitioner's answer, if proven, was a meritorious defense (R. 342, 333), "the order will be that the motion to set aside the default will be denied without prejudice to its renewal in the event that the defendant returns to the United States and makes himself available for conduct of his deposition within 30 days from date." (April 28, 1958, R. 343).

The Government then filed extensive Requests for Admissions under Rule 36, FRCP. (R. 156-161). Petitioner responded fully to such requests. (R. 200-202).

In response to the order of the Court to produce certain documents or account for them, (R. 344), coun-

sel for Petitioner filed numerous documents, and accounted for others. (R. 163-199, 384). On May 27, 1958, counsel for Petitioner filed a Motion for Reconsideration of the Motion to Vacate the Default Order. (R. 163). Attached to this Motion was an affidavit from Drs. Middleton and Caul, Buenos Aires British Hospital, dated May 20, 1958, that it would be necessary for Mr. Fong to remain in the hospital for some time under careful observation and that he will not be able to travel until he is completely recovered. (R. 195). This Motion was denied. (R. 11).

The Hearing on Damages

On July 7, 1958, the hearing on damages commenced. (R. 345-446). The first witness called by the Government was John F. Harrell, Assistant General Counsel of the Maritime Commission. The witness testified as to certain of his legal opinions regarding the contract and certain federal statutes. (R. 361-365). The Court stated that such testimony lacked any materiality. (Unprinted Tr. 54, 69).

The second and final witness called by the Government was Mr. Benjamin F. Carter, Chief of the Ship Sales Branch of the Maritime Commission. (R. 366). He testified that the first time he met Mr. Fong was approximately three years after the contract had been awarded. The purpose of the visit was to request an extension of time within which to scrap three ships still in Subic Bay. (R. 366). The deadline for scrapping all fifteen ships had passed at the time of the visit. (R. 367). A previous request had been made for an extension of time regarding all fifteen ships. (R. 367). Mr. Carter never asked that liquidated damages be paid. (R. 367, 376).

The witness also testified that a request for an extension of time within which to scrap all ships was never acted upon by Maritime. (R. 376). He also testified that Maritime, State and Navy, conferred over the performance of the contract with regard to the three ships remaining in Subic Bay and that they relied on the Navy's finding that the contract had been performed to the best of the contractor's ability and concurred in the Navy's recommendation for an extension of time within which to scrap the three Subic Bay vessels. (R. 374-377, 381-382). The Navy had been designated as Maritime's representative in the prosecution of the contract. (R. 559). The witness also testified that the contract was "not closed". (R. 376). No damages for breach of contract had been assigned by Maritime for that reason. (R. 375-376). The witness was unaware of a report from the Commander of U.S. Naval Forces, Philippines, to the Commander-in-Chief, Pacific saying that performance under the contract was 100% completed as to the vessels remaining in Subic Bay. (R. 374-375).

Witness Radford

While the Government called no other witness, it offered certain portions of the cross-examination of Admiral Arthur W. Radford as an adverse, hostile witness. (R. 384, 420).

Counsel for Petitioner offered portions of the direct examination of Admiral Radford. He testified that he took command as Commander-in-Chief Pacific on or about April 1, 1949. (R. 392). He learned of the contract between Asia Development Corporation and the Maritime Commission in the fall of 1949 or the Spring of 1950. (R. 392). He came to know Mr. Fong

in late 1950. (R. 399). In 1951 Mr. Fong met with Admiral Radford in Honolulu concerning an extension of time to take certain vessels out of Subic Bay. (R. 399-400). The Admiral was later advised that Maritime had granted the requested extension of time. (R. 400-401). He further testified that he was "on the spot" in Subic Bay, that Mr. Fong came over and Admiral Radford told him exactly what he wanted done to clear up the Bay. Mr. Fong assured him that what was desired would be accomplished. (R. 404). The witness testified that changing developments in the Pacific theater between 1949 and 1954 affected the performance of the contract in that the Communists took Shanghai in April, 1949, which caused Petitioner to flee Shanghai and Asia Development Corporation to abandon its ship scrapping yard. (R. 415-416).

The Court refused to allow the testimony of Admiral Radford concerning his investigation in Hong Kong of rumors that some of the vessels involved in this contract had been sold to Communists. At the Admiral's request the U.S. Counsel General in Hong Kong investigated their files and reported that there was no evidence to support an allegation like that. (R. 417-418).

Admiral Radford testified that the Asia Development Corporation had, in the performance of this and other contracts, materially assisted the United States Navy in the prosecution of its Korean war effort. (R. 401-402, 410, 413-416, 569). The Maritime Commission had designated the Navy as its representative in the prosecution of the contract and this responsibility developed upon, and was personally assumed by, the Navy's area Commander, Admiral Radford. (R. 401, 559). He was intimately familiar with the chaotic wartime

conditions then existing in the Far East and testified as to the difficulties ensuing therefrom in the performance of this contract, and the assistance Mr. Fong rendered the Navy. (R. 401-402, 404-405, 413-416).

Witness Fong

Counsel for Petitioner were permitted to read into the record certain portions of Mr. Fong's deposition. He testified that after the investiture of Shanghai by the Communists and the recognition of the communist regime by the British Government, he feared that communist agents and representatives would be sent to Hong Kong to assert claims to the vessels. Asia Development Corporation had moved ten of the vessels from Shanghai to Hong Kong at great cost and transferred them to a corporation under British registration in order to prevent their falling into communist hands. (R. 423). The capital of Hong Kong Shipping Corporation, the transferee, actually belonged to the various stockholders of Asia Development Corporation. (R. 432). The Government did not contend that the transfers of the vessels from Asia Development Corporation to Hong Kong Shipping Corporation constituted a breach of contract. (R. 438).

Except for the Exhibits introduced during the hearing this concluded the proceeding. Counsel for Petitioner made his closing statement to the Court arguing, inter alia, that conclusions of law in the Complaint are not deemed admitted by the effect of the Order of Default; that the Government must prove its entitlement to damages; that an extension of time as to three ships was granted by Maritime and the ships were scrapped within this period; that as a matter of law damages for delay in scrapping the remaining

vessels were waived by the Government by its refusal to act on the requested extension of time; that liquidated damages under the circumstances amounted to a penalty and were not recoverable as a matter of law and that the Government had completely failed to prove the asserted conclusion of law that Mr. Fong was the alter ego of the contracting party, Asia Development Corporation. (R. 438-439).

Counsel for the Government made no oral closing statement but filed a closing statement a month after the conclusion of the hearing, at the request of the Court. (R. 205-221). The Court had asked counsel for the Government to file a written closing statement to make clear "just exactly what you are asking for." (Unprinted Tr. 216). Concerning liquidated damages the Government's closing statement had this to say:

> The question of what is the proper measure of damages to which plaintiff is entitled by reason of its loss of 13 vessels to which it, and it alone, had absolute title and right of possession *requires a brief discussion of why the liquidated damage provisions of Section IX (F) (3) of the contract between the parties are inapplicable . . .*

It is clear from the dollar amounts asserted by the Government in its closing statement to be the proper measure of damages that liquidated damages were not claimed, as the Court stated at the hearing. (R. 206, 411-412). With regard to alter ego theory (that Mr. Fong is the alter ego of Asia Development Corporation) the Government did not maintain that it had proved this allegation but nevertheless requested judgment to be entered in that fashion. (R. 220-221, 434).

The Order for Judgment

On December 30, 1958, the Court filed its Order For Judgment. (R. 221-230). The Court found: (1) that the allegations of the Complaint are accepted as true as a result of the entry of a default and that therefore the judgment will be entered against Mr. Fong as well as the contracting party, Asia Development Corporation. (R. 221, fn.). (2) that the controlling date for determining the wilfulness of Mr. Fong's failure to appear for the resumption of his deposition was February 27, 1958, the date the Court set for the resumption of the deposition. (R. 222, fn.). (3) that the Government has conceded that it may not have recovery under more than one count of the Amended Complaint. (R. 223). (4) that there is grave doubt that counts one, two and three state a claim upon which relief can be granted. (R. 223). (5) that the posture that the case has now assumed upon the entry of the default makes it unnecessary to rule on the Motion To Dismiss (R. 223, fn.). (6) twelve vessels were not scrapped on time and consequently the Government was entitled to liquidated damages in the amount of $516,000. (R. 226). (7) three vessels were scrapped within the time allowed and consequently liquidated damages were not allowed for them. (R. 226-227). (8) actual damages, the sales price of the vessels, are proper damages for five vessels because the Amended Complaint did not state that they were scrapped. (R. 228-229). The Court also held:

> That such a large judgment is by default is the regrettable consequence of defendant Fong's inexplicable failure to appear and implement his defense. *It may be that a meritorious defense to all or part of plaintiff's claim for breach of contract could have been presented.* But the importance in the administration of justice of effectu-

ating the discovery process of the Court made the entry of the default necessary. (R. 229-230).

Judgment was entered by the Court against Mr. Fong for $516,000 for liquidated damages even though the Government had said that liquidated damages were inapplicable, and $511,000 for actual damages. Despite objections by counsel for Petitioner the Court adopted the Government's proposed findings of fact and conclusions in toto. (R. 230-241).

Post Trial Proceedings

On February 20, 1959, counsel for Petitioner filed a Motion for a New Trial, To Set Aside The Judgment by Default And To Amend The Judgment under Rules 52, 55, 59 and 60, FRCP. (R. 243). The grounds urged on the Motion for a New Trial and to Set Aside The Default were that the failure to resume the deposition was not wilful, that Petitioner, subsequent to the entry of the default and at the time of this Motion, was making a bona fide effort to comply with the Order for resumption of deposition. In support of these contentions there was filed a cable from Mr. Fong, dated February 17, 1959, stating that he will resume his deposition in San Francisco as soon as his doctors will permit, or in Sao Paulo at his expense until he was able to travel, and an affidavit from a Brazilian doctor that he had operated on Mr. Fong, would have to operate on him again, and that Mr. Fong could not now travel. (R. 243-248).

The grounds advanced in support of the Motion To Amend The Judgment were that the Government's claim for liquidated damages had been expressly abandoned, that any award of actual damages was improper since such had not been prayed for in count four of

the Amended Complaint and thus Rule 54(c) precludes their award after default.

On June 3, 1959, the Court issued an Order denying the Motion for a New Trial and to Vacate the Judgment but Conditionally Granting the Motion To Amend the Judgment by deleting the award of actual damages. (R. 249-254). The Court ruled: (1) the default was a "sanction" and proper at the time it was entered and will not be vacated although Mr. Fong offers to come to San Francisco to complete his deposition as soon as his health permits or to prepay the travel expenses for Government counsel to complete the deposition. (2) "If both amendments were made the judgment would in effect be vacated." And the Government had not abandoned its claim for liquidated damages. (3) the Government did not claim actual damages until after entry of default. (4) Rule 54(c) precludes the recovery by default of anything in excess of that prayed for under the fourth count, namely, liquidated damages. (5) the Government, which sought the default, may prefer to have a trial on the merits in which it could pursue its claim for actual damages. Consequently, the Judgment was amended to delete the award of actual damages unless the Government consented to vacation of the default. (R. 249-254).

The Government responded to the Court's Order with a Statement that it "hereby waives claim for actual damages under the amended complaint provided that plaintiff is entitled to final judgment for liquidated damages in the amount of $516,000 in accordance with the judgment of this Court" and does not consent to vacation of the default. (R. 255-256).

The parties thereafter appealed and the Court of Appeals affirmed the judgment in all respects.

ARGUMENT

1(a). The record is clear that petitioner complied with orders for the production and admission of documents (R. 156-161, 163-199, 200-202, 344, 384) and was uncontrovertibly willing to complete his deposition immediately in South America, or, in the United States as soon as his doctors would permit him to travel.

Were the Courts below correct in refusing to allow the deposition to be completed in either way, denying petitioner the right to defend against a complaint for $5,595,000 and approving the entry of a default judgment against petitioner of $516,000 when petitioner was not even a party to the contract in question? Cf. *Domenenaere* v. *Rockwell Mfg. Co.*, 23 FRD 686; *Saltzman* v. *Birrell*, 156 F. Supp. 538.

The Trial Court attempted to justify this action by stating that the importance in the administration of justice of effectuating the discovery process of the Court made the entry of default necessary as a "sanction" and the Court of Appeals approved this action. The Court of Appeals may well have been influenced by its incorrect and prejudiced assumption that petitioner made enormous profits.

There was no evidence tendered by the Government, or otherwise available, that petitioner's illness was not real, that he would not complete the deposition, that he was not afraid of re-arrest or that his failure to obey court orders was wilful. The Court of Appeals seems to suggest that petitioner, regarded as "contumacious" by that Court, was being punished for civil contempt, which would be fundamentally erroneous. *Duell* v. *Duell*, 178 F. (2d) 683.

Petitioner asserts that the constitutional limits of due process do not permit such exercise of the Court's power under these circumstances. This Court approved the striking of an answer and the entry of a default judgment in *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 312, because the defendant had completely refused to comply with the Court's orders. The rationale there was that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. That cannot be the case where the government admits petitioner has a meritorious defense (R. 333), petitioner had obeyed discovery orders to the then limit of his ability and demonstrated his willingness to complete the deposition.

This Court has recently noted the constitutional limitations upon the power of courts, even in aid of their own valid processes, to deny a party the opportunity for a hearing on the merits of his cause. *Societe Internationale* v. *Rogers*, 357 U.S. 197.

> These two decisions leave open the question whether Fifth Amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good-faith efforts, to comply with a pretrial production order. The presumption utilized by the Court in the *Hammond* case might well falter under such circumstances. Cf. Tot v. United States, 319 U.S. 463. Certainly substantial constitutional questions are provoked by such action. Their gravity is accented in the present case where petitioner, though cast in the role of *plaintiff*, cannot be deemed to be in the customary role of a party invoking the aid of a court to vindicate rights asserted against another. Rather petitioner's position is more analogous to that of a *defendant*, * * * *. p. 210.

1(b) The Courts below held that the Trial Court was *required* to accept the allegations of the complaint as true as a result of the entry of default even where the allegations were made only on information and belief. If this be a correct statement of the law then the provisions of Rule 55(b)(2) "If, in order to enable the court to enter judgment . . . or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper . . ." are meaningless. Adherence to the policy of law and procedure as expressed in the Rule was urged on the Court by petitioner's counsel at the hearing on damages. It is particularly appropriate where a substantial judgment is sought through alter ego allegations of domination and control of Asia Development Corporation by Petitioner, which are bare conclusions of law not admitted by default. The holding of the Courts below is in conflict with *Cragin* v. *Lovell*, 109 U.S. 194; *Pope* v. *U.S.*, 323 U.S. 1; *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 *U.S.* 683. Cf. *Eastern Industries* v. *Traffic Controls*, 142 F. Supp. 381.

The result of these holdings has been to allow the government to establish liability without proof and to hold petitioner personally liable under a contract to which he was not a party. As a precedent, the holding of the Courts below leaves the defaulting defendant without the protection of a court between himself and the unproven allegations of his opponent. It deprives the Court of the right to ascertain the truth before converting a complaint to a judgment and does violence to the policy of Rule 1, F.R.C.P. Such a punishment of default too far exceeds the "crime" committed by

a defendant. The "sanction" of default imposed herein constituted an unconstitutional denial of all right to defend as a mere punishment. *Hovey* v. *Elliott*, 167 U.S. 409. Such a holding by the Courts below reverts the policy of the law to the time when judicial rigidity forced the birth of courts of equity.

II. The arrest of a person is a strange commencement of a civil action in the United States. This doubtless effective method of commencing the action is available to the Government when it alleges that a violation of the False Claims Act may have occurred. However, there must be a method of testing the statutory basis of such action without awaiting the many months or years before a trial on the merits can be had. Moore, Federal Practice, § 12.11. Otherwise, a judicial refusal to act when the validity of the alleged violation of the False Claims Act is challenged could result in a man's indefinite incarceration or restriction of his liberties. By the terms of the bond imposed herein petitioner was shackled within the confines of three federal court jurisdictions. The right of travel is a liberty protected by the Fifth Amendment. *Kent* v. *Dulles*, 357 U.S. 116. An alien lawfully visiting in the United States is entitled to the protection of our Constitution. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33.

The method of testing the validity of an alleged violation of the False Claims Act is the time honored motion to dismiss. The theory that a man's liberty can be restricted and he deprived of his property by a Court in a civil action, without the right to have the legal propriety of such action determined by the Court is repugnant to our most elemental concepts of justice. "When society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps." *Coppedge* v. *U.S.*, — U.S. —, 30 USLW 4303, 4306.

Here, the question was simply whether a certain letter and scrapping certificates constituted a "claim" under the Act. The Government based its case on these items and petitioner contended that these items, which did not ask the Government for money or property, could not legally constitute a claim under the Act. Neither party ever did, or could do anything to alter the legal posture of this aspect of the case. There remained only for the Court to decide as a matter of law whether these documents constituted a "claim" under the Act.

"It is obvious that there are cases which justify and indeed compel the granting of such motion." *Rennie & Laughlin, Inc.* v. *Chrysler Corporation*, 242 F. (2d) 208, 213. Where the civil action depends upon the construction of a criminal statute (*U.S.* v. *McNinch*, 356 U.S. 595) and involves the extraordinary procedure of arrest, bail and restrictions on individual liberty, it should fall within such category of cases. "No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for *prompt, eminently fair* and sober criminal law procedures." *Coppedge* v. *U.S.*, supra.

Other Courts have not hesitated to rule on the pleadings alone under the False Claims Act. *Olson* v. *Melon*, 4 F. Supp. 947; *U.S.* v. *Cooper Corp.*, 42 F. Supp. 317; *Cahill* v. *Curtiss-Wright Corporation*, 57 F. Supp. 614; *U.S.* v. *Bressler*, 60 F. Supp. 676, aff'd 160 F. (2d) 403 (C.A. 2d); *U.S.* v. *Farina*, 153 F. Supp. 819; *U.S.* v. *Mercur Corp.*, 83 F. (2d) 178 (C.A. 2d), cert. den. 299 U.S. 576; *U.S.* v. *Bausch & Lomb Optical Co.*, 131 F. (2d) 545 (C.A. 2d); aff'd 320 U.S. 711; *U.S.* v. *Tieger*, 234 F. (2d) 589 (C.A. 3rd), cert. den. 352 U.S. 941; *U.S.* v. *Cochrane*, 235 F. (2d) 131 (C.A. 5th), cert.

den. 352 U.S. 941; *U.S.* v. *Borth*, 266 F. (2d) 521 (C.A. 10th); *U.S.* v. *McNinch*, 356 U.S. 595.

The Court's refusal to ever rule on the motion to dismiss violated petitioner's Constitutional right not to be jailed, deprived of his property and liberty without due process of law. It is a denial of due process to use the "sanction" of default to bar a challenge to Governmental action which restricts property and liberty, as the courts below did. (R. 223, fn.).

CONCLUSION

By the actions of the Courts below petitioner has been deprived of Fifth Amendment due process at the time when, and because, he was unable to help himself and complete his deposition on the impossible terms set by the Court below. The Government is entitled to the completion of petitioner's deposition, which has always been available to it, and petitioner in turn is entitled to his day in court. "In final analysis, a court has the responsibility to do justice between man and man; and general principles cannot justify denial of a party's fair day in court except upon a serious showing of wilful default." *Gill* v. *Stoloff*, 240 F. (2d) 669, 670.

The actions of the courts below denied petitioner Fifth Amendment due process and have unmercifully punished petitioner for matters beyond his control. For the foregoing reasons, this petition for a writ of certiorari should be granted.

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May, 1962